DISTRICT ATTORNEY
COUNTY OF NEW YORK
ONE HOGAN PLACE
New York, N. Y. 10013
(212) 335-9000

CYRUS R. VANCE, JR.
DISTRICT ATTORNEY

March 16, 2017

Risa S. Sugarman, Esq.
Chief Enforcement Counsel
New York State Board of Elections
Division of Election Law Enforcement
40 North Pearl Street, Suite 5
Albany, NY 12207-2729

RE: January 2016 Referral Pursuant to Election Law § 3-104(5)(b)

Dear Ms. Sugarman:

By letter dated January 12, 2016, you advised this office that the New York State Board of Elections (the "BOE") had determined that "reasonable cause exists to believe violations warranting criminal prosecution for potential New York State Election Law and Penal Law crimes" had been committed in connection with certain New York State Senate races in 2014. Specifically, it was alleged that close staff and associates of New York City Mayor Bill de Blasio (a group referred to as the "Coordinated Campaign"[1]) devised and implemented a plan to fund targeted State Senate races by soliciting contributions from unions and wealthy donors. These contributions were then passed through county committees to Senate campaigns to pay political consultants, thereby evading direct candidate contribution limits. Pursuant to Election Law § 3-104(5)(b), the letter referred the matter to this office to "investigate any indictable offense or offenses and to prosecute any indictable offense or offenses committed by any entity and/or individual regarding Penal Law and New York State Election Law crimes." (The January 12, 2016, BOE letter and accompanying materials are referred to herein as "the BOE Referral.")[2]

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[1] This group was also known as "Team Coordinated," "Team de Blasio," and the "Coalition."

[2] The principal focus of the BOE Referral was a pattern of structured transactions in connection with the State Senate races, and such allegations were at the core of this office's inquiry. The BOE Referral also alleged that some who were solicited to contribute to, among other things, Mayor de Blasio's nonprofit, Campaign for One New York, also did business

After an extensive investigation, notwithstanding the BOE's view that the conduct here may have violated the Election Law, this office has determined that the parties involved cannot be appropriately prosecuted, given their reliance on the advice of counsel.[3] As discussed below, this conclusion is not an endorsement of the conduct at issue; indeed, the transactions appear contrary to the intent and spirit of the laws that impose candidate contribution limits, laws which are meant to prevent "corruption and the appearance of corruption" in the campaign financing process.[4]

In this letter we first describe the steps this office has taken to investigate this matter over the past year. Second, we provide summaries of our factual findings and legal conclusions. Third, we recommend steps the BOE and the State should consider to prohibit more clearly these types of transactions in the future.

I. The Scope of the Criminal Investigation

Since the receipt of the BOE Referral, this office has reviewed the voluminous documents provided by the BOE, including email correspondence, invoices, bank records, memoranda, spreadsheets, budgets, and BOE public filings. We also obtained and analyzed over one million additional documents and other materials from more than 100 individuals and entities pursuant to grand jury subpoenas and search warrants. Finally, we conducted interviews of over 50 individuals, including City Hall officials and key members of the Coordinated Campaign, individual and union donors, candidates and campaign managers, representatives of county committees, and political consultants.[5]

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with New York City, and that contributions may have been made as a *quid pro quo* for favorable treatment of those donors. It has been widely reported that other authorities are investigating allegations of any such possible *quid pro quo* arrangements, and those allegations are not addressed in this letter.

[3] The BOE Referral concluded that "[t]he violations discovered by [the BOE's] investigation can only be described as willful and flagrant." However, in its investigation, the BOE did not have knowledge of the legal advice the Coordinated Campaign received: advice that is discussed further below. We also note that the Election Law felony statute includes certain terms, such as "unauthorized committee" and "expenditures," that could make enforcement of the statute difficult on the particular facts presented here.

[4] *See Buckley v. Valeo*, 424 U.S. 1, 25-26 (1976); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 356-57 (2010); *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1441 (2014). *See also Buckley*, 424 U.S. at 26-27 ("To the extent that large contributions are given to secure political quid pro quo's from current and potential office holders, the integrity of our system of representative democracy is undermined."); *Fed. Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 (2001) ("[A]ll members of the Court agree that circumvention is a valid theory of corruption"). Here, the transactions created a potential risk or appearance of corruption: had the State Senate candidates won their seats, they may have felt beholden to the interests of the Coordinated Campaign.

[5] Given this office's obligation to maintain grand jury secrecy pursuant to Criminal Procedure Law § 190.25(4)(a), the facts recited in this letter have all been obtained independently of the grand jury proceeding.

IIa. Summary of Factual Findings

In the summer of 2014, representatives of Mayor Bill de Blasio and Governor Andrew Cuomo devised a plan to help Democratic candidates win New York State Senate races in an effort to obtain a Democratic majority in the State Senate. The plan was documented in a July 23, 2014, memorandum entitled "State Senate 2014 Coordinated Campaign Plan" ("The July Memorandum"). The candidates included Justin Wagner (Senate District 40), Terry Gipson (Senate District 41), Cecilia Tkaczyk (Senate District 46), and Ted O'Brien (Senate District 55).[6]

The plan's core leadership included Mayor de Blasio's Director of Intergovernmental Affairs, Emma Wolfe, and Neal Kwatra, who was appointed chief campaign strategist for the New York State Democratic Committee ("NYSDC") in 2014 by Governor Cuomo.[7] According to The July Memorandum, their role was to "formulate recommendations on spending, campaign strategy, coordination with candidate campaigns/[Democratic Senate Campaign Committee ("DSCC")], oversight, and management of consultants." The memorandum provided that any disagreements among the core leadership "about spending, strategy, etc." would be resolved by the Governor and the Mayor.

By the fall of 2014, the involvement of the Governor's staff greatly diminished, and, as a result, Wolfe became the primary leader of the group that executed the plan.[8] Many in the group were closely associated with Mayor de Blasio, and were or had been employed by the Office of the Mayor. In fact, a number of people, including Wolfe, took leaves of absence from City Hall to work full time on the ultimately unsuccessful Senate campaign effort.[9]

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[6] The original plan included eight Senate candidates. Thereafter, the Coordinated Campaign targeted five campaigns for support. Marc Panepinto, another candidate supported by the Coordinated Campaign, did not receive transfers of funds from a county committee. This office's investigation centered on the flow of contributions from county committees to the campaign committees listed above.

[7] *See, e.g.,* Fredric U. Dicker, *Cuomo Appointed 'Vote or Else' Strategist*, NEW YORK POST, November 3, 2014, http://nypost.com/2014/11/03/author-of-democrats-threatening-letter-identified/.

[8] *See, e.g.,* Michael M. Grynbaum, *De Blasio Fights for a Democratic State Senate With Calls, Cash and Ads,* NY TIMES, Oct. 29, 2014, http://www.nytimes.com/2014/10/30/nyregion/de-blasio-fights-for-a-democratic-state-senate-with-calls-cash-and-ads.html?_r=0; Matt Flegenheimer and Thomas Kaplan, *As de Blasio Aids Bid for Democratic Senate, Cuomo Is a Nearly Invisible Man,* NY TIMES, Oct. 9, 2014, http://www.nytimes.com/2014/10/10/nyregion/as-de-blasio-aids-bid-for-democratic-senate-cuomo-is-a-nearly-invisible-man.html?_r=0; Jimmy Vielkind, *Cuomo Still Sending Mixed Signals on State Senate,* POLITICO, Nov. 3, 2014, http://www.politico.com/states/new-york/albany/story/2014/11/cuomo-still-sending-mixed-signals-on-state-senate-017145; Mike Vilensky and Erica Orden, *Democrats in Albany Skeptical of Gov. Andrew Cuomo's Support in November Election*, WALL STREET JOURNAL, July 25, 2016, http://www.wsj.com/articles/democrats-in-albany-skeptical-of-gov-andrew-cuomos-support-in-november-election-1469496850.

[9] *See, e.g.,* Ross Barkan, *Top Bill de Blasio Staffers Take Leave for the Campaign Trail*, OBSERVER, Oct. 23, 2014, http://observer.com/2014/10/top-bill-de-blasio-staffers-take-leave-for-the-campaign-trail/; Jillian Jorgensen, *Bill de Blasio Defends City Hall Staffers On Leave for Campaigns*, OBSERVER, Oct. 29, 2014, http://observer.com/2014/10/bill-de-blasio-defends-city-hall-staffers-on-leave-for-campaigns/.

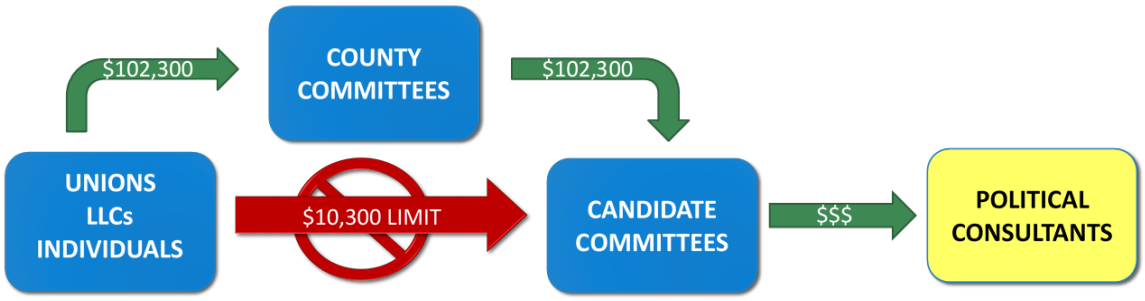
The July Memorandum contemplated raising $6 million to $8 million from 30 to 40 donors, with each donor giving approximately $200,000. It also included an itemized budget for television, mail, and field operations in each of the targeted Senate races that would be paid for with the money raised. In addition, The July Memorandum proposed a steering committee of labor unions that would meet regularly with the key members of the Coordinated Campaign to discuss strategy, polling results, and fundraising.

As recommended in The July Memorandum, the Coordinated Campaign managed key decision-making for the targeted campaigns, including enlisting the services of certain political consulting firms closely linked to Mayor de Blasio, including BerlinRosen, AKPD Message & Media ("AKPD"), and Red Horse Strategies. To raise the funds necessary to pay these firms, members of the Coordinated Campaign actively solicited contributions primarily from wealthy donors, including individuals, entities, and unions, that had previously donated to Mayor de Blasio or his causes. The donors were asked to contribute to county committees rather than candidate committees because the maximum a donor could contribute to a county committee was much higher than the maximum a donor could contribute directly to a candidate committee. For example, in 2014, a labor union could give up to $102,300 to a county committee, but could only give up to $10,300 to a candidate committee in the general election.[10]

In furthering the plan of the Coordinated Campaign, the county committees, upon receipt of the contributions, transferred the vast majority of the funds to the individual candidate committees, which used the funds for campaign expenditures, including consultants and media advertising. The flow of money from donor to county committee to campaign committee to consultant often occurred within days. In most cases, the time from donation to payment of a consultant invoice was so short that the only reasonable conclusion is that the Coordinated Campaign had pre-determined the ultimate recipient of the funds at the time the donation was solicited.

[10] Election Law § 14-114. A donor could also give up to $6,500 to a candidate committee in the primary election.

The following diagram shows the flow of funds:



Our analysis is that each contribution and transfer on its own complied with the applicable candidate contribution limits and the rules regarding transfers from county committees to individual campaign committees. When viewed together, however, it appears that the Coordinated Campaign structured the transactions in an effort to avoid the much lower direct candidate contribution limit. This structuring enabled an unprecedented amount of money to flow under the direction of the Coordinated Campaign from the donors to the county committees to the candidate committees to the political consultants.

For example, the Putnam County Democratic Committee ("PCDC") received contributions totaling $671,329.79 in 2014. In the previous five years, the next highest dollar amount of contributions to PCDC was $38,651.68 in 2012. Within days of receiving the contributions in 2014, PCDC transferred $640,750 to two authorized candidate committees, Friends of Justin Wagner and Friends of Terry Gipson, which almost immediately expended virtually all of the funds on political consultants such as BerlinRosen, AKPD, and Red Horse Strategies. Similarly, the Ulster County Democratic Committee ("UCDC") received four contributions totaling $364,000 in October 2014. In the previous five years, the next highest dollar amount of contributions to UCDC was $50,438 in 2009. Furthermore, within eight days of receipt of the $364,000 in 2014, $330,000 was transferred from UCDC to the Friends of Cecilia Tkaczyk, an authorized candidate committee, which in turn paid $320,000 to AKPD.

IIb. Summary of Legal Conclusions

There are two relevant criminal statutes – a felony and a misdemeanor. Election Law § 14-126(6) provides:

> Any person who shall, acting on behalf of a candidate or political committee, knowingly and willfully solicit, organize or coordinate the formation [or][11] activities of one or more unauthorized committees, make expenditures in connection with the nomination for election or election of any candidate, or solicit any person to make any such expenditures, for the purpose of evading the contribution limitations of this article, shall be guilty of a class E felony.

Relevant to our analysis, this statute contains two significant prohibitions. First, it prohibits (a) persons acting on behalf of a candidate from (b) knowingly and willfully (c) soliciting, organizing or coordinating the activities of an unauthorized committee to evade Election Law contribution limits. Second, it prohibits those same persons from knowingly and willfully (d) soliciting others to make expenditures in connection with the election of a candidate with the same purpose, to evade the Election Law contribution limits.

Election Law §14-126(5), provides:

> Any person who knowingly and willfully contributes, accepts or aids or participates in the acceptance of a contribution in an amount exceeding an applicable maximum specified in this article shall be guilty of a class A misdemeanor.

This misdemeanor prohibits knowing and willful participation in contributing or receiving an over-the-limit contribution. For example, a person who knowingly and willfully gives or receives a contribution greater than $10,300 for a State Senate candidate in the general election would be guilty of this misdemeanor.

As these are criminal statutes, the critical element in both is the mental state, or *mens rea*, requirement: both require a defendant to have acted knowingly and willfully, that is, "with knowledge that [one's] conduct was unlawful."[12] In this regard, our investigation has obtained

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[11] There is a typographical error in the statute. The statute says "of" but obviously intends "or." The plain reading of the statute and its legislative history clearly suggest this was a scrivener's error. *See* Election Law § 478 (1974) and § 14-112 (1976).

[12] *Bryan v. United States*, 524 U.S. 184, 193 (1998). *See also Gormley v. New York State Ethics Comm'n*, 11 N.Y.3d 423, 427 (2008); *People v. Coe*, 71 N.Y.2d 852, 854-55 (1988) (as the term "willfully" is used in the Public Health Law, "the People were required to show only that defendant was aware that her conduct was illegal").

evidence that members of the Coordinated Campaign sought and obtained advice from Laurence Laufer, an election-law attorney,[13] to ensure that the structure and potential funding methods of this coordinated effort complied with applicable law. The Coordinated Campaign apprised Laufer of the relevant facts from the initial planning of the effort through its execution, and Laufer provided consistent advice throughout. For example, the evidence shows:

- On July 16, 2014, Wolfe and Kwatra, among others, initially consulted Laufer, who later that day wrote a memorandum describing different funding vehicles such as the NYSDC, the DSCC, and county committees, and discussing several legal issues, including transfers, contribution-use caps, and a prohibition against earmarking;

- On July 23, 2014, Laufer was provided with The July Memorandum, which, again, described the Coordinated Campaign and the proposed structure of the contribution arrangements, including the use of the state and county committees as a mechanism to provide funds to individual campaigns; in response, Laufer provided comments approving the proposed arrangements;

- Between July 16, 2014, and October 21, 2014, Laufer provided five memoranda to members of the Coordinated Campaign and reviewed two plan documents given to him by the Coordinated Campaign, in connection with his ongoing advice and guidance for the funding efforts;

- Laufer was in regular and frequent contact with members of the Coordinated Campaign by phone and email; and

- Members of the Coordinated Campaign informed Laufer that they were tracking and coordinating the spending of funds that they solicited, and gave him a copy of a "tracking sheet" they used for that purpose; in turn, Laufer approved all such actions.

[13] Laurence Laufer was Mayor de Blasio's campaign counsel for the 2013 mayoral race.

In assessing any potential criminal liability, good-faith reliance on the advice of counsel negates the *mens rea* element in a criminal case, because one who acts upon such advice cannot be found to have "willfully" broken the law.[14] To establish the advice-of-counsel defense, a defendant must show that he or she: (i) fully disclosed all material facts to his or her counsel before seeking advice; and (ii) actually relied on his or her counsel's advice in the good-faith belief that his or her conduct was legal.[15]

These elements appear to be satisfied here. The Coordinated Campaign repeatedly made Laufer aware of its activities, including its solicitation of donors, the advice and guidance it gave to the party committees, its coordination and oversight of the candidate committees' spending, and its selection of specific political consultants. Laufer's memoranda containing his legal advice were distributed widely to those involved in the Coordinated Campaign, and he was in regular communication with the relevant parties. There is also no evidence that the advice was solicited, delivered, or followed in bad faith.

In approving the Coordinated Campaign's plan, Laufer's only prohibition was "earmarking," which, as Laufer advised, "occurs only when the contributor gives some kind of direction to an intermediate recipient regarding the ultimate use of the contributor's contribution." According to this analysis, as long as the donor or the donor's agent did not direct the county committee where to send the donation, no earmarking occurs. Our investigation found no evidence that donors directed any of the county committees where to send a donation (in fact, there is no evidence that any donor had any communication with any of the county committees); instead, the Coordinated Campaign members monitored and directed the flow of money each step of the way from donor to the ultimate candidate recipient.[16]

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[14] *See United States v. Evangelista*, 122 F.3d 112, 117 (2d Cir. 1997), *quoting United States v. Beech-Nut Nutrition Corp.,* 871 F.2d 1181, 1194-95 (2d Cir. 1989), *quoting Williamson v. United States*, 207 U.S. 425, 453 (1908) ("'[I]f a man honestly and in good faith seeks advice of a lawyer as to what he may lawfully do . . . , and fully and honestly lays all the facts before his counsel, and in good faith and honestly follows such advice, relying upon it and believing it to be correct, and only intends that his acts shall be lawful, he could not be convicted of crime [sic] which involves willful and unlawful intent. . . .'").

[15] *See United States v. Evangelista*, 122 F.3d at 117.

[16] The BOE Referral also identified a number of possible ancillary Election Law and Penal Law violations in connection with the funding of the 2014 State Senate races. We have considered these, and conclude that they cannot be appropriately prosecuted because the reliance on the advice of counsel would also negate the *mens rea* elements found in these statutes and/or because there is insufficient evidence to support a prosecution.

In short, the facts here do not make out a provable violation of the Election Law's criminal provisions.[17] Nevertheless, they appear contrary to the intent and spirit of the law. The type of closely managed coordinated plan at issue creates an end run around the direct candidate contribution limits by taking advantage of inconsistent provisions in the Election Law. Specifically, the Coordinated Campaign solicited donations to particular county committees, tracked the money transferred from the county committees to the campaigns, and ensured that the money was then used to pay the political consultants.

Of course, the leaders of a political party have the right to support their candidates, and one of the primary roles of party committees is to coordinate with candidates to help elect those the party has decided to support. However, the facts here raise a serious question of how central a role a party may play before its actions cross the line of impermissibly circumventing the Election Law's contribution limits.[18]

III. Recommendations

It is the view of this office that the applicable Election Law statutes should prohibit transactions that are designed to convey indirectly large contributions from donors to individual campaigns in amounts that would be illegal had the donors contributed directly to the campaigns. Whether or not "earmarking" occurs (or there are other indicia of circumvention), as a practical matter, such a closely orchestrated fundraising campaign can render the contribution limits meaningless.

With these points in mind, to avoid a similar outcome in the future, this office offers three recommendations for consideration by the legislature and the BOE. First, it is important to understand that this office's determination is limited to the question of whether criminal charges can be appropriately brought: that is, whether we could prove each element of each crime beyond a reasonable doubt. This determination does not foreclose the BOE or others from pursuing any civil or regulatory action that they determine might be warranted by these facts; such a remedy might well provide guidance to those involved in the electoral process.

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[17] As with all investigations, if new evidence develops at a later date, this office may re-open this investigation to consider such evidence at that time.

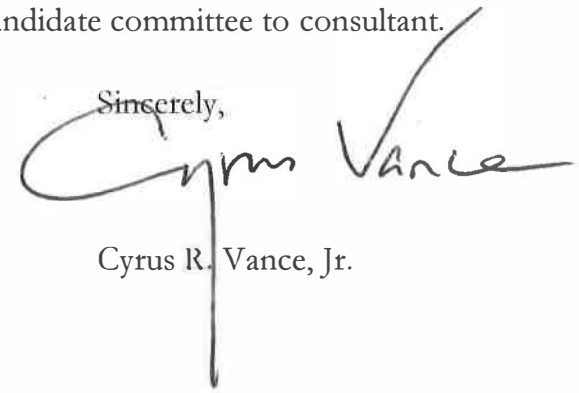
[18] Political parties' spending limitations have been held subject to the same level of scrutiny as limitations on individuals and nonparty groups. As the Supreme Court noted in a case addressing unlimited coordinated expenditures by a party, "The fault here is . . . a refusal to see how the power of money actually works in the political structure. . . . Parties . . . perform functions more complex than simply electing candidates; whether they like it or not, they act as agents for spending on behalf of those who seek to produce obligated officeholders." *Fed. Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. at 450, 452.

Second, this office has been unable to locate any opinions or other precedent directly bearing on the legal issues at the heart of this matter. If the public reports surrounding this matter are not sufficient to put the campaign finance community on notice of the BOE's views, an advisory opinion by the BOE specifically describing the conduct that is and is not prohibited by the criminal statutes may be warranted to deter such transactions in the future.

Third, in light of the apparent ambiguities, legislation may be necessary to clarify the Election Law and to prevent any workarounds that might undermine the purpose of the contribution limits. For example, the BOE might propose legislative change to prohibit unlimited transfers from constituted committees to candidate committees, as such transfers may circumvent direct candidate contribution limits and contribution-use caps. The terms "unauthorized committee" and "expenditures" should also be more clearly defined.

Finally, the Election Law should be amended to overtly state that transactions may not be structured in a manner to achieve indirectly what is prohibited by means of a direct contribution; that is, to prohibit third parties from orchestrating the flow of contributions from donor to constituted committee to candidate committee to consultant.

Sincerely,



Cyrus R. Vance, Jr.